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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket 95-185

Request for Clarification of the Information Technology Association of America

The Information Technology Association of America ("ITAA")[1] requests that the Commission clarify Paragraph 995 of the Interconnection Order[2], which addresses the offering of information services by competitive local exchange carriers ("CLECs").

INTRODUCTION AND SUMMARY

Paragraph 995 of the Interconnection Order states that "telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or Section

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1 ITAA is the principal trade association of the nation's information technology industries. ITAA's members provide a wide variety of information products, software, and services. This includes information (enhanced) services provided using transmission capacity obtained from regulated local exchange and interexchange carriers. The Association participated in the initial phase of this proceeding.

2 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, rel. Aug. 8, 1996, petitions for review pending [hereinafter "Interconnection Order"].

251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well."[3] Paragraph 995 is intended to make clear that a CLEC that interconnects its facilities with those of the incumbent local exchange carrier ("LEC"), or that provides local exchange service using unbundled network elements obtained from the incumbent LEC, may use those facilities to provide information services.[4]

ITAA is concerned that the Commission's statement that CLECs may use the "same arrangement" to provide both information and local exchange service could be misconstrued to mean that a CLEC's information service operation can obtain transmission capacity at the same price as the CLEC's local telephone operation. Such an interpretation would place non-CLEC information service providers -- who must obtain transmission capacity at generally available tariffed rates -- at a substantial and unfair competitive disadvantage.

By this petition, ITAA requests the Commission to clarify that facilities-based CLECs must acquire the transmission capacity that underlies their information service offerings at the same price, terms, and conditions that they make that capacity available to non-affiliated information service providers ("ISPs").[5] ITAA further requests the Commission to clarify that

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3 Id. at ¶ 995.

4 See id. (noting that the Commission seeks to provide CLECs "the opportunity to compete effectively with the incumbent [LEC] by offering a full range of services to end users without having to provide some services . . . through distinct facilities or agreements").

5 Throughout this pleading, ITAA uses the term "information services," which is the term used by the Telecommunications Act. As ITAA has previously demonstrated, the term "information services" is substantially similar, if not identical, to the term "enhanced (continued...)

reseller-CLECs that obtain transmission capacity at the wholesale rates provided for under Section 251(d)(4) of the Act may not use this capacity to provide information services or, if they are permitted to do so, that their information service operations must obtain the underlying transmission capacity at the same price, terms, and conditions as the carrier makes that capacity available to non-affiliated ISPs.

I. THE COMMISSION SHOULD CLARIFY THAT FACILITIES-BASED CLECs THAT PROVIDE INFORMATION SERVICES MUST OBTAIN THE UNDERLYING TRANSMISSION SERVICE ON A NON-DISCRIMINATORY BASIS

The Commission has long recognized that information services "are dependent upon the common carrier offering of basic services."[6] Consequently, the Commission has observed, allowing a carrier to provide underlying transmission capacity to its own information service affiliate at "cost," while making the identical capacity available to non-affiliated information service providers at substantially higher prices, "is a classic version of the price squeeze."[7] Such a tactic, as the Commission is aware, can make it difficult, if not impossible, for unaffiliated information service providers to compete, thereby reducing user choice.

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[5](...continued)
services," which has long been used by the Commission. See Comments of the Information Technology Association of America, CC Docket 96-149, at 12-14 (filed Aug. 15, 1996).

[6] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Order, 77 F.C.C.2d 384, 475 (1980) (subsequent history omitted) [hereinafter Computer II Final Order"].

[7] Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II), 100 F.C.C.2d 1057, 1060-61 (1985) [hereinafter "Asynchronous/X.25 Waiver Order"].

In order to prevent facilities-based carriers from using their control over the underlying facilities to limit competition in the information services market, the Commission has long required that:

> [C]arriers that own common carrier transmission facilities and provide enhanced services . . . must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized.[8]

This requirement is often referred to as "transmission-at-tariff."

The transmission-at-tariff requirement is grounded on the non-discrimination provision contained in Section 202 of the Communications Act.[9] Accordingly, from the inception of the rule in Computer II, the Commission has required all facilities-based carriers that provide information services -- not just those with market power -- to obtain the underlying transmission service at the same price that they make this capacity available to others.[10]

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8 Computer II Final Order, 77 F.C.C.2d at 475.

9 See AT&T Communications, Inc., Memorandum Opinion and Order, 101 F.C.C.2d 144, 163 n.42 ("Apart from the conflict with Computer II," allowing a carrier to provide basic services to its information service operation at cost "represents[s] improper discrimination under Section 202(a) of the Act. . . . Enhanced service vendors and their customers would be disadvantaged by paying a substantially different price than the [carrier's] customers for identical transmission channels."); see also Competition in the Interstate Interexchange Marketplace, Order on Reconsideration, 10 FCC Rcd 4562, 4580 & n.72 (1995) (noting applicability of Section 202 non-discrimination requirements to carrier provision of basic services underlying enhanced services).

10 See Interexchange Marketplace Reconsideration Order, 10 FCC Rcd at 4580 ("[A]ll carriers offering enhanced services that own their own transmission facilities . . . must continue to unbundle basic and enhanced services and they must offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced services operations."); see also Asynchronous/X.25 Waiver Order, 100 F.C.C.2d at 1105 (applying the (continued...)

The Commission's transmission-at-tariff rule has been highly successful. By preventing carriers from engaging in discriminatory price squeezes, the rule has promoted robust competition in the market for information services. At the same time, the rule has ensured that users of carrier-provided basic services are not required to cross-subsidize carrier's competitive operations. Application of the transmission-at-tariff requirement to facilities-based CLECs will produce these same pro-competitive results.

The price that CLECs pay to obtain their underlying transmission facilities are likely to be substantially lower than the price at which these carriers will make their transmission service available to the public. If CLECs were allowed to impute only the cost of their transmission facilities to their information services operations, they would be able to place non-carrier-affiliated information service providers at a substantial and unfair competitive disadvantage.[11] The end-result would be to reduce, rather than increase, the level of competition in the information services market. Such a result plainly would be inconsistent with the pro-competitive goals of the Telecommunications Act.

Ultimately, the Commission's rules should ensure that all entities -- regardless of whether they are classified as carriers, information service providers, or other end-users -- are able to obtain the underlying network elements at the same cost-based prices. Until that occurs,

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[10](...continued)
transmission-at-tariff requirement to AT&T, GTE, as well as facilities-based carriers that "are not subject to the separate subsidiary requirement").

[11] In the present case, exempting facilities-based CLECs from the transmission-at-tariff requirement also would provide them with an unfair competitive advantage over incumbent LECs, which are subject to the transmission-at-tariff requirement.

however, the Commission should make clear that -- under its existing rules -- CLECs that provide local service using their own facilities, or that use network elements obtained from incumbent LECs, must acquire the transmission capacity that underlies their information service offerings at the same price, terms, and conditions as the carrier makes that capacity available to all other information service providers.[12]

II. THE COMMISSION SHOULD CLARIFY THAT RESELLER CLECs MAY NOT PROVIDE INFORMATION SERVICES OR, IF THEY MAY, THAT THEY MUST OBTAIN THE UNDERLYING TRANSMISSION SERVICE ON A NON-DISCRIMINATORY BASIS

Paragraph 995 of the Interconnection Order does not reference Section 251(c)(4) of the Communications Act, which authorizes a CLEC to enter the local exchange market by reselling capacity obtained from incumbent LECs at significant discounts. ITAA requests that the Commission clarify that, by failing to reference this provision, it meant that a reseller-CLEC may not use resold local exchange capacity to provide information services. Such an interpretation would be consistent with the goals of the Telecommunications Act. As the Commission explained in the Order, Section 251(c)(4) "is intended to facilitate [local exchange]

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[12] The Commission also should make clear that if, at some future date, it were to eliminate the requirement that non-dominant CLECs file tariffs, these carriers would remain subject to the requirement that they provide the basic services underlying their information service offerings to non-affiliated information service providers at non-discriminatory prices. Cf. Policy and Rules Concerning the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 11 FCC Rcd 7141, 7157-58 & n. 77 (1996) (Even if the Commission were to forbear from requiring non-dominant interexchange carriers to file tariffs for basic interexchange service, they would still be subject to the statutory non-discrimination requirement and the Section 208 complaint process.).

competition on a resale basis."[13] Therefore, the Commission concluded, discounted services are not available to parties -- whether classified as "telecommunications carriers" or "end users" -- that seek to use this capacity for purposes other than the provision of local exchange service.[14]

If, notwithstanding the above, the Commission intended to allow CLECs that obtain local exchange service on a resale basis pursuant to Section 251(c)(4) to use this capacity to provide information services, ITAA requests that the Commission clarify that the CLEC must obtain the transmission capacity that underlies those offerings at the same price, terms, and conditions as the carrier makes that capacity available to all other information service providers. Such an approach is consistent with long-standing Commission practice. Pursuant to the Interconnection Order, CLECs that obtain local transmission capacity pursuant to Section 251(c)(4) are eligible for discounts of as much as 25 percent below the generally available retail price.[15] These carriers, in turn, are likely to resell the capacity at a substantially higher price.[16] Allowing these carriers to impute the discounted cost of this capacity to their information service operations -- rather than the generally available price -- would result in

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13 Interconnection Order at ¶ 875.

14 See id.

15 See id. at ¶¶ 932-33.

16 A CLEC can rationally price its service at any level up to, and including, the generally available retail price offered by the incumbent LEC.

precisely the same "price squeeze" that has provided the basis for the Commission's transmission-at-tariff rules.[17]

CONCLUSION

For the foregoing reasons, ITAA respectfully requests that the Commission clarify that CLECs that provide local exchange service using their own facilities, or by combining their facilities with unbundled network elements obtained from incumbent LECs, must acquire the transmission capacity that underlies their information service offerings at the same price, terms, and conditions that they make that capacity available to non-affiliated information service providers. ITAA further requests that the Commission clarify that CLECs that obtain local exchange service on a resale basis either: (1) must not use this capacity to provide information services or (2) may only provide information services if they obtain the transmission capacity

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[17] ITAA recognizes that, under existing rules, entities that provide information services solely by combining resold transmission capacity with computer processing applications are not subject to the transmission-at-tariff requirement. This reflects the fact that any entity that wishes to provide information services can obtain the underlying transmission capacity from facilities-based carriers at generally available tariffed rates. In the present case, in contrast, only reseller CLECs are permitted to obtain transmission capacity at the Commission-specified discounts.

that underlies their information service offerings at the same price, terms, and conditions as the carrier makes that capacity available to non-affiliated information service providers.

Respectfully submitted,

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